No. 06-984

IN THE

Supreme Court of the United States

JOSÉ ERNESTO MEDELLÍN,

Petitioner,

—v.—

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR PETITIONER

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ARGUMENT

In the *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice settled a dispute between the United States and Mexico by deciding, among other things, that the United States must grant "review and reconsideration" of the conviction and sentence of petitioner José Ernesto Medellín and 50 other Mexican nationals to determine if they have been prejudiced by the violation of their consular notification rights. It is undisputed that the United States has an international obligation to comply with the *Avena* judgment, regardless of the merits of that judgment, under three duly ratified treaties—the Optional Protocol to the Vienna Convention, the ICJ Statute, and the UN Charter—and the President has now determined that the United States will comply.

Texas argues that compliance with the judgment would intrude on the Article I lawmaking powers of Congress, but that is wrong for three separate and independently sufficient reasons. *First*, by virtue of the Supremacy Clause, the treaties requiring compliance with the *Avena* judgment are *already* the "Law of the Land" by which all state and federal courts in this country are "bound." U.S. CONST. art. VI. Texas argues that the treaties are non-self-executing, but nothing in the treaty or any statute calls for legislation or any other action to make them effective. *See United States v. Rauscher*, 119 U.S. 407, 418-19 (1886). *Second*, even if the obligation to comply were non-self-executing, so that some further action were necessary to make it judicially enforceable, the President, who has authority under Article II to "take Care that the Laws be faithfully executed," has taken it. *Finally*, in any event, the President has independent authority under Article II to require compliance with the result of an international dispute-resolution process mandated by treaty. If the President's independent

foreign affairs authority allows him to settle disputes with foreign nations even *without* the assent of the Senate, *see, e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981), he surely has the authority to settle a dispute by honoring a commitment as to which the Senate gave its advice and consent.

Nor would compliance with the *Avena* judgment and the President's determination intrude on the Article III judicial power. The obligation of the United States under the relevant treaties is to give effect to the *Avena* judgment in the particular cases it adjudicated. This Court has held that decisions of international tribunals created by treaty are "conclusive" and "not re-examinable" in U.S. courts by operation of the treaty. *Comegys v. Vasse*, 26 U.S. (1 Pet.) 193, 212 (1828). Hence, compliance with *Avena* as a judgment in the cases that it adjudicated would not in any way compromise this Court's decision in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), as the controlling interpretation of the relevant treaty provision as a matter of U.S. law.

Finally, federalism principles do not bar compliance. By virtue of both the Supremacy Clause and the President's Article II authority, the *Avena* judgment supplies a federal rule of decision that preempts state law. Texas law specifically authorizes prisoners to bring habeas corpus petitions. Having opened its courts to hear proceedings of that general kind, Texas cannot avoid the application of federal law by imposing limitations that it labels "jurisdictional." *Howlett v. Rose*, 496 U.S. 356, 381 (1990). The President has not changed the jurisdiction of the federal or state courts in any way, but, at most, changed the substantive federal law those courts are to apply.

According to Texas and its *amici*, the Framers left the United States with a dysfunctional Constitution. Texas acknowledges that the Constitution allows the President to enter into treaties with the advice and consent of the Sen-

ate, that those treaties are binding on the United States as a whole, and that compliance with the *Avena* judgment is required by treaty. But as Texas sees it, the best the United States can do is *request* compliance, and Texas is free to say no. Texas is wrong. The Framers of the Constitution were acutely familiar with the resistance that treaties had met when they affected locally controversial issues, especially the treatment of foreign nationals and others under state property law and in the state criminal process, and the dangers that that resistance posed to the interests of the Nation as a whole. *See* Pet'r Br. 23-26 & nn.11-13. They solved the problem by the Supremacy Clause, making treaties judicially enforceable as preemptive federal law. On point after point, Texas asks this Court to overturn long-settled understandings about the role of treaties under the Constitution and to ignore dispositive precedents from this Court dating back to the founding. Far from allowing this Nation to make promises it cannot keep, the Constitution requires both this Court and the President to ensure that the United States keeps faith with the international obligations it undertakes.

I. Enforcement of the *Avena* Judgment and the President's Determination Would Not Intrude on the Article I Powers of Congress.

A. The Supremacy Clause Requires Courts to Enforce the United States's Obligation to Comply with the *Avena* Judgment.

The Supremacy Clause (which Texas does not mention until page 40 of its brief, and then barely addresses) makes treaties the "Law of the Land," and provides that the "Judges in every State" are "bound" thereby just as they are by federal statutes. U.S. CONST. art. VI. As this Court has made clear, once the President and Senate have ratified a treaty, *see* U.S CONST. art. II, § 2, courts "are bound . . .

to enforce in any appropriate proceeding the rights of persons growing out of that treaty," *Rauscher*, 119 U.S. at 419, and to " 'resort[ ] to the treaty for a rule of decision for the case before it *as [they] would to a statute*,' " *id.* (quoting *Head Money Cases (Edye v. Robertson)*, 112 U.S. 580, 599 (1884)) (emphasis added); *see also* Pet'r Br. 26-28. In other words, under the Constitution, the courts' role is to ensure "*the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations*." *Rauscher*, 119 U.S. at 418 (emphasis added). An agreement to abide by the result of an international adjudication is a treaty obligation like any other. *See, e.g., La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 463 (1899); *Comegys*, 26 U.S. at 212. Thus, even without the President's determination, the Texas courts would be bound to give effect to commitments that the United States made, in the Optional Protocol, the UN Charter, and the ICJ Statute, to abide by the *Avena* judgment.

Texas misunderstands the constitutional design when it argues that the obligation in the relevant treaties is not self-executing and hence requires separate implementing legislation. Resp't Br. 14-15. This Court has held implementing legislation to be necessary to the enforcement of treaty obligations only when the treaty itself, the ratification instrument, or an act of Congress specifically require it.[1] But in the absence of that special circumstance, this

[1] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 735 (2004) (giving effect to declaration of Senate in ratification instrument that treaty was non-self-executing); *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 49-50 (1913) (holding that Congress's enactment of implementing legislation effectively replaced treaty provisions with statutory provisions in domestic law); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-15 (1829) (interpreting treaty language as requiring legislation), *overruled by United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88-89 (1833) (holding same treaty provision self-executing after examining Spanish-language version). In this respect, a treaty is no different from

Court has from the beginning routinely enforced treaties under which foreign nationals have asserted rights, with no concern that the treaties might not be self-executing.[2]

Texas also argues that the President and Senate did not believe that the Vienna Convention would change U.S. law. Resp't Br. 24. That argument is irrelevant, because that is not the treaty at issue here. *See infra* Part II.A.[3] Here, the

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a statute: where a treaty by its terms requires Congress to pass subsequent legislation, the courts will not perform Congress's function, *see Foster*, 27 U.S. at 314-15; but the same is equally true when the effect of a statute is contingent on the adoption of subsequent legislation, *see, e.g.*, 2 U.S.C. § 632(a), or regulations, *see Dunlap v. United States*, 173 U.S. 65 (1899).

[2] *See, e.g., El Al Isr. Airlines v. Tseng*, 525 U.S. 155, 161-62 (1999); *United States v. Alvarez-Machain*, 504 U.S. 655, 659-61 (1992); *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 179-80 (1982); *Kolovrat v. Oregon*, 366 U.S. 187, 191-93 (1961); *Clark v. Allen*, 331 U.S. 503, 507-08 (1947); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 161-62 (1940); *Cook v. United States*, 288 U.S. 102, 108-10 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 49-51 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 124-26 (1928); *Cheung Sum Shee v. Nagle*, 268 U.S. 336, 345-46 (1925); *Asakura v. Seattle*, 265 U.S. 332, 341-42 (1924); *Johnson v. Browne*, 205 U.S. 309, 320-22 (1907); *Geofroy v. Riggs*, 133 U.S. 258, 266-68 (1890); *Wildenhus's Case*, 120 U.S. 1, 17 (1887); *Rauscher*, 119 U.S. at 418-20; *Chew Heong v. United States*, 112 U.S. 536, 539-40 (1884); *Hauenstein v. Lynham*, 100 U.S. 483, 488-89 (1880); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561-62 (1832); *Hughes v. Edwards*, 22 U.S. (9 Wheat.) 489, 496 (1824); *Soc'y for Propagation of Gospel v. New-Haven*, 21 U.S. (8 Wheat.) 464, 489-90 (1823); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818); *Chirac v. Chirac's Lessee*, 15 U.S. (2 Wheat.) 259, 274-75 (1817); *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813); *Higgonson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 251, 281-82 (1796).

[3] Texas is also incorrect. The ratifying history of the Vienna Convention demonstrates that the United States understood that that treaty would change U.S. law, *see Hearing Before Senate Committee on For-*

relevant obligation of the United States is its obligation under the Optional Protocol, the UN Charter and the ICJ Statute to comply with the *Avena* judgment. The *Avena* judgment, in turn, requires review and reconsideration of Mr. Medellín's conviction and sentence "within the overall judicial proceedings relating to the individual defendant concerned." *Avena*, ¶ 141 (Pet. App. 174a). That is not an obligation to enact legislation, but to take judicial action. *See, e.g., Rauscher*, 119 U.S. at 419 (quoting *Head Money Cases*, 112 U.S. at 599) (courts will enforce treaty rights "of a nature to be enforced in a court of justice").[4]

Texas makes the same mistake when it asserts that Mr. Medellín himself cannot invoke the treaties because they create no "individual rights." Resp't Br. 17-19. As long as a treaty "prescribe[s] a rule by which the rights of the private citizen or subject may be determined," it will be

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eign Relations, S. EXEC. REP. No. 91-9, at 18 (1969) ("To the extent that there are conflicts with Federal legislation or State laws the Vienna Convention, after ratification, would govern."), and would do so in much the same way that earlier bilateral consular conventions had done, *see* Resp't Br. 24 (quoting *id.* at 2). The United States also clearly understood that its own understanding of the Vienna Convention would not necessarily be controlling, because it agreed to submit disputes over interpretation and application of the Convention to compulsory ICJ adjudication under the Optional Protocol. U.S. Br. 22.

[4] The passages cited by Texas from the legislative history of the U.S. adoption of its long-defunct blanket consent to compulsory ICJ jurisdiction, Resp't Br. 21-22, are irrelevant. As the context makes clear, those discussions pertain to remedies that a foreign government could pursue *in the international arena* if the ICJ issued a judgment against the United States that exceeded the scope of its jurisdiction. *See* 92 Cong. Rec. 10683, 10691-94 (1946); *A Resolution Proposing Acceptance of Compulsory Jurisdiction of International Court of Justice: Hearings on S. Res. 196 Before the Subcomm. of the Senate Comm. on Foreign Relations*, 79th Cong. 140-43 (1946). They do not address which branch or level of U.S. government is responsible for compliance *under the United States's own domestic constitutional system* when the ICJ judgment is within the ICJ's jurisdiction. *See also* U.S. Br. 27.

applied as the rule of decision whenever those rights are at issue in a court of justice. *Rauscher*, 119 U.S. at 419 (quoting *Head Money Cases*, 112 U.S. at 598-99).[5] Again, this Court has from the beginning routinely enforced the Nation's treaty commitments whenever they bear on the life, liberty or property of litigants before the Court, without requiring any special magic words in the treaty. *See supra* note 2.[6] It is hard to imagine a right more "individual" to Mr. Medellín than the right not to be executed without the review and reconsideration of *his* conviction and

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[5] Congress may repudiate the treaty obligation by subsequent legislation and accept whatever international consequences that breach might have. *See, e.g., Whitney v. Robertson*, 124 U.S. 190, 194-95 (1888); *Head Money Cases*, 112 U.S. at 598-99. That is the import of the language that Texas quotes, but misinterprets, from the *Head Money Cases*, which was decided two terms before *Rauscher* and authored by the same justice. Resp't Br. 13 (quoting 112 U.S. at 598). The Court was merely acknowledging the consequences of the last-in-time rule: If Congress enacts legislation inconsistent with a treaty, the Court must apply the later-enacted statute regardless of the international consequences. But in the absence of such a statute, treaties have a dual character in the United States: They are, by international law, an agreement between nations, while our Constitution, diverging from British practice, also makes them part of domestic law. *See Rauscher*, 119 U.S. at 417-18; *Head Money Cases*, 112 U.S. at 598-99; *Foster*, 27 U.S. at 314.

[6] *See also Medellín v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting) ("[I]f a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed."). Texas fails to cite a *single* case in which this Court refused to enforce a treaty obligation on the basis that it did not involve an "individual right." Texas cites the decision of the Court of Appeals in *Committee of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 937-38 (D.C. Cir. 1988), but that case involved military operations, which no individual citizen would have standing to challenge regardless of whether the challenge was based on constitutional, statutory, or treaty grounds, and which present a nonjusticiable political question in any event. *See* ICJ Experts Br. 24 n.38.

sentence that are required "within the overall judicial proceedings relating to the individual defendant concerned" by a legally binding judgment addressing *his* own case. *See Avena* ¶ 141 (Pet. App. 174a).[7]

B. The President Has the Authority to Execute the United States's Obligation to Comply with the *Avena* Judgment.

This Court need not reach the issue of whether the *Avena* judgment is enforceable in U.S. courts by virtue of the treaties and the Supremacy Clause alone, because the President has, in any event, exercised his power to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3; *see* Pet'r Br. 28-33. Contrary to certain Texas *amici*, Const'l & Int'l Scholars Br. 11-13, this Court has already settled that the President's power includes the authority to use the necessary means to enforce a treaty, even though those means would be beyond his power in the absence of a treaty. *See Valentine v. United States*, 299 U.S. 5, 8-9 (1936) (President may extradite suspect when authorized by treaty or statute, but not otherwise); Pet'r Br. 28-33; Fmr. U.S. Diplomats Br. 6-7; *see also* U.S. Br. 26-27. And contrary to Texas's apparent assumption, *e.g.*, Resp't Br. 13-16, when a dispute to which the United States is a party has been submitted to binding resolution, the "law" that the President must execute is the legal obligation to enforce the final award, regardless of whether he agrees with its mer-

[7] Though the point is not at issue here, *see infra* Part II.A, the underlying right to be informed of the right to contact one's consulate also belongs to the individual foreign national by the plain and unambiguous terms of the Vienna Convention, and the negotiating history confirms that that was the parties' understanding. *See, e.g.*, Fmr. Diplomats Br. 13-14 & nn.10-11; *Jogi v. Voges*, 480 F.3d 822, 828-35 (7th Cir. 2007); *Cornejo v. County of San Diego*, No. 05-56202, 2007 U.S. App. LEXIS 22616, *34-57 (9th Cir. Sept. 24, 2007) (Nelson, J., dissenting); *LaGrand Case (Ger. v. U.S.)*, 2001 I.C.J. 466, 494, ¶ 77 (June 27). *But see, e.g., Cornejo, supra*, at *7-30 (majority opinion).

its. *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 611-12 (1838).[8]

Texas does not even attempt to address *Sanitary District v. United States*, 266 U.S. 405 (1925) (cited in Pet'r Br. 29, 33; U.S. Br. 19), in which this Court confirmed the Executive's power to sue a state agency in order to execute "treaty obligations to a foreign power" to regulate the use of water from Lake Michigan, even in the absence of a statute authorizing suit, and even where no individual right or proprietary right of the United States was involved. *Id.* at 425-26. If the President can execute a treaty obligation by suing on his own, he can surely execute the same obligation by directing compliance in others' suits in which the obligation is invoked. *See* U.S. Br. 17-18. Here, in any event, the United States has appeared as *amicus* both in Texas and before this Court in order to achieve compliance, and no purpose would be achieved by requiring that it initiate a separate action. U.S. Br. 19.[9]

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[8] Contrary to what Texas states, Resp't Br. 33, the power of the United States to enforce the *Avena* judgment is consistent with the position that the United States took in *Breard v. Greene*, 523 U.S. 371 (1998). That case involved an "indicat[ion]" of provisional measures, ICJ Statute art. 41, which is not a final decision and which the United States regarded as nonbinding by the terms of the ICJ Statute. *See* Pet'r Br. 22, n.10.

[9] Texas also argues that the Court must look to the UN Charter for any authority to comply with the *Avena* judgment. Resp't Br. 19-24. But even if that were so, it would not lead to the result that Texas urges. Article 94(1) of the Charter states that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party." Pet. App. 81a. If that language, rather than the Supremacy and Take Care Clauses, had to be construed to designate the United States official responsible for compliance, *but see supra* Part I.A, that official could only be the President, together with the Executive Branch officials acting at his direction, as they are the sole authorized representatives of the United States before all organs of the UN and in international relations generally. *See* U.S. Br. 12-13; Pet'r Br. 40-41.

C. The President Has the Authority to Order Compliance with the *Avena* Judgment in the Exercise of His Power to Conduct Foreign Affairs.

This Court also need not reach the question of whether the President may enforce the *Avena* judgment under his power to take care that the laws be faithfully executed, because the President's independent foreign affairs authority more than suffices to require compliance with the *Avena* judgment. *See* Pet'r Br. 34-42; U.S. Br. 4-6, 9-21.

First, Texas attempts to distinguish *American Insurance Association v. Garamendi*, 539 U.S. 396, 415 (2003); *Dames & Moore*, 453 U.S. at 679, 682-83; *United States v. Pink*, 315 U.S. 203, 223 (1942); and *United States v. Belmont*, 301 U.S. 324, 330-331 (1937), on the ground that in that "narrow subset of cases" the President acted only to settle "civil claims between individuals and foreign governments (or foreign companies)." Resp't Br. 27-29. But nothing in the reasoning of those cases supports such a hypertechnical reading; to the contrary, they squarely establish the President's power to settle disputes with foreign governments as a component of his constitutional authority to conduct the Nation's foreign affairs. Pet'r Br. 35-36, 38-39. Contrary to Texas's supposition, moreover, those cases were not all about private civil claims for money or property. The agreement in *Dames & Moore*, for example, secured the release of the American hostages held at the U.S. Embassy in Tehran and settled government-to-government as well as private claims, and *Garamendi* dealt not with private claims but with a disclosure obligation under California insurance law. Surely Texas does not mean to suggest that the President has less authority when he seeks to "protect the interests of the United States citizens detained abroad, promote the effective conduct of foreign relations, and underscore the United States' commitment to

the rule of law," than when he settles private property claims. U.S. Br. 9.

Second, Texas and some of its *amici* argue that the President has contravened the "policy preferences" of Congress that they purport to glean from the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA). Resp't Br. 25-26; *see also* Va. Br. 3, 9, 11-12. But AEDPA says nothing about the President's authority under Article II to enforce treaty obligations in state courts. AEDPA also does nothing to alter the state courts' obligation to apply federal law or the scope of this Court's review of those decisions on certiorari; it only limits collateral review of those decisions on federal habeas corpus. Indeed, Texas argues as if AEDPA were license for state courts to disregard federal law, whether treaty or otherwise. To the contrary, that statute rests on the assumption that they will faithfully apply federal law. *See, e.g., Carey v. Musladin*, 127 S. Ct. 649, 653-54 (2006); *Medellín v. Dretke*, 544 U.S. 660, 680 (2005) (O'Connor, J., dissenting). If anything, the President's determination dovetails with the scheme established by AEDPA, which recognizes state courts as the primary forum for review of convictions and sentences. And in any event, vague "policy preferences" of the sort Texas posits are far from sufficient to attribute to Congress an intent to breach a treaty. *See, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

Finally, Texas asserts that to allow the President to decide that the United States will comply with the *Avena* judgment "could, in turn, open the door to a host of potential abuses from future Presidents," because the Court could devise no "workable limiting principle." Resp't Br. 43-44. That same objection could have been made to each of *Garamendi*, *Dames & Moore*, *Belmont*, and *Pink*; but

that did not cause this Court to deny the President authority that the Constitution conferred. Instead, the Court has come to evaluate each exercise of that authority by reference to the categories first identified in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In acting to fulfill a legal commitment made by the treatymaking political branches, the President acted at the zenith of his authority. Pet'r Br. 38; U.S. Br. 10. Indeed, this Court's precedents make clear that in the exercise of his independent foreign affairs authority, the President can "effect[ ] a change in the substantive law" applicable to a given case, *Dames & Moore*, 453 U.S. at 685; here, he acted merely to reiterate a rule of decision that, as a treaty obligation, already had the status of federal law. *See supra* Part I.A.

II. Enforcement of the *Avena* Judgment and the President's Determination Would Not Intrude on the Article III Powers of the Federal Courts.

A. This Case Is About Enforcement of a Judgment Undisputedly Binding by Treaty, Not Interpretation of the Vienna Convention.

Texas and its *amici* argue that enforcement of the *Avena* judgment would usurp the role of this Court to interpret federal law because that judgment is inconsistent with the interpretation of Article 36 of the Vienna Convention in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006). This case, however, is not about the interpretation of that provision, but about the enforcement of a judgment adjudicating an individual's rights pursuant to treaties making that adjudication final and binding. Pet'r Br. 19-22. Hence, Texas's argument is inconsistent with this Court's teaching that decisions of international tribunals established by treaty must be given effect in the courts of the United States whether or not those courts agree with the result.

In *Comegys v. Vasse*, 26 U.S. at 212-13, the Court explained in an opinion by Justice Story that a judgment of a U.S.-Spain binational tribunal was "conclusive and final" and was "not re-examinable" in the courts of the United States. *See also Kinkead v. United States*, 150 U.S. 483, 495 (1893) (explaining *Comegys*); Laingen Br. 12-13 & nn.23-25; *cf. Auffmordt v. Hedden*, 137 U.S. 310, 329 (1890) (enforcing appraiser's award in favor of United States; rejecting constitutional challenge to statute making award conclusive); *Kendall*, 37 U.S. at 611-12 (enforcing domestic arbitral award against United States). In a case of this kind, the law that must be enforced is the commitment to treat the result as binding—not the underlying law as the courts might independently interpret it. *See Auffmordt*, 137 U.S. at 329; *Kendall*, 37 U.S. at 611-12; *Comegys*, 26 U.S. at 212. Hence, applying the *Avena* judgment and the President's determination as the rule of decision here is fully consistent with this Court's "duty 'to say what the law is,' " *Sanchez-Llamas*, 126 S. Ct. at 2684 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), as well as this Court's observations that "[t]he ICJ's decisions have '*no binding force* except between the parties and in respect of that particular case,' " and are "not binding precedent *even as to the ICJ itself*." *Id.* (quoting ICJ Statute art. 59) (Court's emphasis).

Texas argues, by supposed application of the domestic law of *res judicata*, that the *Avena* judgment cannot be enforced because Texas and Mr. Medellín were not parties before the ICJ. Resp't Br. 19-20. Where international relations are concerned, however, the states of the union have no separate existence; the national government speaks and acts for the nation as a whole and all its constituent parts. *See, e.g., Japan Line Ltd. v. County of L.A.*, 441 U.S. 434, 448 (1979); *Belmont*, 301 U.S. at 331. Conversely, Mexico, which has the authority to represent the interests of its nationals in international relations, asserted the rights of

Mr. Medellín and each of the other affected Mexican nationals before the ICJ in *Avena*, and the ICJ expressly adjudicated those rights in its judgment. *See* ICJ Experts Br. 10-17.

In any event, Texas misses the point when it attempts to frame the issue as one of *res judicata* between the *Avena* parties. The decision of an international tribunal "within the scope of [its] authority, is conclusive and final" not by operation of the domestic common law of *res judicata*, but by "[t]he object of the treaty" to give the tribunal authority to finally resolve a question in dispute between two nations. *Comegys*, 26 U.S. at 212; *see also Kinkead*, 150 U.S. at 495; *La Abra*, 175 U.S. at 461-63. Thus, as this Court held in *Comegys*—rejecting essentially the same argument that Texas makes here—the fact that the parties before the Court may differ from the parties who appeared before the international tribunal is simply "not . . . material" to the conclusive effect of the judgment. 26 U.S. at 212.

B. It Is Long Settled That the Treaty Power Encompasses the Power to Submit Disputes to Binding Adjudication by an International Tribunal.

Texas and its *amici* also err when they argue that Article III prevents the United States from allowing international tribunals to decide treaty questions. *First*, if Texas means to argue that Article III bars enforcement of a decision of a court *other than* one of the United States, involving a question of U.S. federal law arising in a case within its jurisdiction, it is wrong. For example, this Court has held that, by statute, state-court judgments must be given preclusive effect even when an Article III federal court would be prevented from deciding the merits of a federal question within exclusive federal jurisdiction. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 374-75 (1996). Judgments of foreign courts and domestic and foreign arbitral tribunals are also routinely enforced by statute and

common-law principles without reexamining the merits.[10] Judgments of international tribunals are treated no differently. *See Comegys*, 26 U.S. at 212.

Second, if Texas means to argue that the ICJ must somehow be treated as if it were a creature of the U.S. government alone, it would not follow that its adjudication of disputes violates Article III. This Court has repeatedly upheld the delegation of adjudicative authority to non-Article III bodies.[11]

Finally, if Texas means to argue that Article III bars the President, with the advice and consent of the Senate, or

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[10] *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629, 632-36 (1985) (by statute, federal courts must enforce decision of commercial arbitrators in international case on questions of nonwaivable federal law within exclusive jurisdiction of federal courts); *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263, 279 (1932) (statute requiring federal courts to enforce arbitral awards does not violate Article III); *Auffmordt*, 137 U.S. at 329 (statute making customs appraiser's report binding does not violate Article III); *Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895) (foreign judgments, if entitled to comity, will be enforced without reexamining merits); *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 747-48 (1832) (giving *res judicata* effect to judgment of Spanish court affecting application of treaty).

[11] *See, e.g., Schweiker v. McClure*, 456 U.S. 188, 198-200 (1982) (hearing officer appointed by private corporation); *Atlas Roofing Co. v. OSHA*, 430 U.S. 442, 455 (1977) (administrative agency); *Ex parte Bakelite Corp.*, 279 U.S. 438, 458-59 (1929) (non-Article III court); *Auffmordt*, 137 U.S. at 326-29 ("merchant appraiser"). Specifically, this Court has held that non-Article III courts may hear disputes under laws made pursuant to "powers conferred by the Constitution respecting treaties," *see, e.g., Bakelite*, 279 U.S. at 451 (citing cases), and other disputes involving "public rights," *see, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 & n.8 (1989) (suit by individuals against the U.S. government); *La Abra*, 175 U.S. at 456 (suit by one nation or its nationals against the government of another under a treaty). *See also* Pet'r Br. 39 n.17. If anything, a proceeding by a foreign government on behalf of its nationals is even *more* "public" than a suit directly by an individual.

indeed the President alone, acting pursuant to his independent authority, to agree to submit disputes to international adjudication, it would be asking this Court to overturn two centuries of practice and precedent. Though treaty obligations are incorporated into U.S. domestic law by the Supremacy Clause, they are not *only* questions of U.S. law, but also law for other nations as well, to be interpreted in light of the plain language of the treaty and the shared understanding of the parties. *See, e.g.*, *Sumitomo*, 457 U.S. at 180. It has long been understood that the judges or commissioners appointed under those treaties do not function as judicial "officers" of the United States or, for that matter, the opposing nation; rather, they act as independent "arbitrators between the two countries." Alexander Hamilton, THE DEFENCE No. 37 (1796), *reprinted in* 20 THE PAPERS OF ALEXANDER HAMILTON 13, 20 (Harold C. Syrett ed. 1974).

From the earliest days of the Constitution, and even earlier, the United States has made numerous treaties calling for submission of disputes to international tribunals. Pet'r Br. 39 n.17 (citing Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833 (2007)). Today as well, dozens if not hundreds of international agreements requiring submission of private or public disputes to binding international adjudication are in force. *See, e.g.*, ICJ Experts Br. 18 & n.25; Fmr. U.S. Diplomats Br. 25-28 & nn.26-27; Mex. Br. 3 & n.2. The disputes adjudicated under such treaties have affected both the rights of individuals and the sovereign interests of the Nation and its individual states. *See, e.g.*, ICJ Experts Br. 12-21. Once again, Texas attacks long-settled understandings by suggesting that Article III puts this vital exercise of the treatymaking and foreign affairs power beyond the authority of the United States or prevents the United States from carrying into effect its results.

III. Enforcement of the *Avena* Judgment and the President's Determination Would Not Violate Principles of Federalism.

Contrary to Texas's claim that the President's determination "[a]lter[s] the [s]tructure of the Texas [j]udiciary," Resp't Br. 39, Texas has the same courts today, with the same jurisdiction, as it did the day before the President issued his determination. The only thing that has changed, if anything, is the law that those courts must apply on the merits. *See Dames & Moore*, 453 U.S. at 684-85 (executive agreement that courts must decline to hear claims involving Iran changed only substantive law, not jurisdiction).

Not even one of the justices of the Texas Court of Criminal Appeals (CCA) suggested that that court lacked jurisdiction over Mr. Medellín's petition. Rather, the CCA dismissed the petition based on a state statute limiting subsequent habeas applications. Pet. App. 64a. The CCA clearly recognized that federal law *could* preempt this state-law procedural bar, and that the CCA would have the power to grant relief if it did. It decided, however, that under federal law, the federal government had not effectively exercised that preemptive power through the proper procedures and organs of government. Pet. App. 27a, 46a-47a. This, alone, should be sufficient to dispose of any suggestion that Texas lacks courts "fully competent to provide the remedies the federal [law] requires." *Howlett v. Rose*, 496 U.S. at 378.

While Texas may label its procedural bar "jurisdictional," in the sense of non-waivable, "[t]he fact that a rule is denominated jurisdictional does not provide a [state] court an excuse to avoid the obligation to enforce federal law if the rule does not reflect . . . concerns of power over the person and competence over the subject matter." *Howlett*, 496 U.S. at 381. As long as Texas has courts that are capable of adjudicating "this same type of claim," they

may not hold themselves to be without jurisdiction simply because state law would not allow them to entertain the claim. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *accord, e.g., Howlett*, 496 U.S. at 378-79; *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 58 (1912). And treaties, no less than other federal law, can preempt state-law procedural bars. *Hopkirk v. Bell*, 7 U.S. at 456-57 (treaty preempted state statute of limitations); *see also Missouri v. Holland*, 252 U.S. 416, 432 (1920) (treaty power not limited to Article I powers of Congress).

Texas law recognizes a cause of action in habeas corpus to review a conviction. *See* TEX. CRIM. PROC. CODE arts. 11.01-11.65.[12] Thus, Texas law supplies the cause of action, while the *Avena* judgment and the Presidential determination provide the substantive content of that claim and preempt any state-law procedural bar that functions as the state's defense to that claim. While states ordinarily "may apply their own neutral procedural rules to federal claims," they may not do so when "those rules are pre-empted by federal law." *Howlett*, 496 U.S. at 372. This case is not one in which a state court has refused to hear, for example, an untimely due process or ineffective assistance claim. Rather, unlike those cases, the federal-law obligation under the *Avena* judgment and the President's determination is to grant "review and reconsideration" on the merits to deter-

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[12] Texas *amici* err by suggesting an Eleventh Amendment bar. Va. Br. 18-19 n.12 (citing *Alden v. Maine*, 527 U.S. 706 (1999)). Habeas corpus petitions are not suits against the state for Eleventh Amendment purposes, *see, e.g., Ex parte Royall*, 117 U.S. 241, 249 (1886); in any event, Texas voluntarily entertains such petitions. Moreover, the federal preemption Texas challenges arises only to avoid Texas's procedural-bar defense within that state-recognized proceeding, and therefore does not implicate Eleventh Amendment concerns. *See, e.g., Poindexter v. Greenhow*, 114 U.S. 270, 286 (1885).

mine if Mr. Medellín suffered prejudice from the breach of Article 36.[13]

IV. The President's Determination Is Binding by Its Terms.

Texas denies the obvious by suggesting that the President's determination should be read "as a request, and not a command." Resp't Br. 47. That instrument is written entirely in mandatory, not precatory, terms: "pursuant to the *authority* vested in me as President . . . the United States *will discharge* its international obligations . . . by having state courts *give effect*" to the *Avena* judgment. Pet. App. 187a (emphasis added). Were there any doubt, the briefs the United States has filed before this Court, signed by both the Solicitor General and the Legal Advisor to the State Department, would remove it. *See, e.g.*, U.S. Br. 25-26; *Garamendi*, 539 U.S. at 423 & n.13 (treating congressional testimony of executive officers as conclusive of President's policy).

V. Texas Has Not Complied with Either the *Avena* Judgment or the President's Determination.

Texas argues, as it did for the first time in its brief in opposition to the petition, that the state trial court on collateral review has already complied with *Avena* in Mr. Medellín's case years before *Avena* was even decided, ren-

[13] Texas and some of its *amici* invoke the "anti-commandeering doctrine" of *Printz v. United States*, 521 U.S. 898, 935 (1997); but as Texas acknowledges, Resp't Br. 41, this Court made clear in *Printz* itself that that doctrine does not apply to state courts. 521 U.S. at 928-929. Texas offers no reason for this Court to overrule its longstanding precedents (*e.g., Howlett; Testa; Mondou*), to introduce a new doctrine into an area that those cases fully address, or to upset long-settled understandings of the relationship between state and federal courts. *See, e.g., Printz*, 521 U.S. at 907; *Levitt v. Fax.com, Inc.*, 857 A.2d 1089, 1094 (Md. 2004).

dering the questions presented moot. Resp't Br. 49-50. To the contrary, as petitioner explained at the petition stage, the *Avena* judgment itself rejected the contention that the relevant obligations had already been complied with in Mr. Medellín's case, and the President's determination makes clear that the obligation of review and reconsideration is prospective. Reply to Br. in Opp. 3-5. In any event, as the United States pointed out at oral argument in the CCA, *see id.* at 5 n.1, the *Avena* judgment expressly rejected the approach, taken by the state trial court in Mr. Medellín's case, of collapsing treaty rights into constitutional rights instead of considering them on their own terms, so its findings could not possibly have satisfied *Avena*. *See id.* at 4-5. Finally, even if the adequacy of the state trial court's review were somehow still open for debate, Texas's argument would not amount to an issue of mootness, but at best an additional, disputed, fact-dependent merits issue that was not passed on below, *see id.* at 2-3, and is beyond the scope of the questions presented here.

CONCLUSION

Petitioner respectfully requests that the Court reverse the judgment of the Texas Court of Criminal Appeals and remand petitioner's case for review and reconsideration consistent with the *Avena* judgment and the President's determination.

Respectfully submitted,

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